TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 841.

THE UNITED STATES, APPELLANT,

vs.

CHARLES MORTON.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 21, 1884.

accession 21816

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1 I.—*Petition.*—*Filed July* 11, 1883.

United States Court of Claims.

FIRST LIEUTENANT CHAS. MORTON, 3d U. S. Cavalry,
vs.
THE UNITED STATES. } 13963.

Petition.

To the honorable the chief justice and judges of the Court of Claims:

1. Your petitioner, Chas. Morton, first lieutenant, Third U. S. Cavalry, respectfully represents that he is a citizen of the United States and an officer of the regular Army of the United States, at present holding the rank of first lieutenant in the 3rd Regiment of Cavalry, U. S. Army; that he has at all times borne true faith and allegiance to the Government of the United States, and that he has at no time voluntarily aided or abetted or given encouragement to rebellion against said Government.

2. That he served as an enlisted man in the volunteer military forces of the United States from the 29th day of July, 1861, to the 14th day of September, 1864, and was then honorably discharged the service of the United States by reason of the expiration of his term of enlistment.

3. That subsequently he was appointed as a conditional cadet,
2 and admitted on probation as such cadet into the military service of the United States on or about the 15th day of June, 1865; that in this capacity he was admitted to the United States Military Academy at West Point, in the State of New York, on or about June 15, 1865, and having subsequently, to wit, January, 1866, passed the examination required by law, having taken the oath of office prescribed by law for cadets in the military service of the United States, and having (with the consent of his parent) signed articles of engagement for service in the armies of the United States for the term of eight years, unless sooner discharged, and having fully complied with all the requirements of law to entitle him to the rights and privileges incident to the rank of cadet in the military service of the United States, he received his warrant as such cadet on the day of January, 1866, to rank as such from the 15th day of June, 1865.

4. Your petitioner further says that he served as a cadet in the military service of the United States at West Point, in the State of New York, from the 15th day of June, 1865, to the 15th day of June, 1869, when, having been duly graduated, he was promoted and commissioned a second lieutenant in the Third Regiment of Cavalry, U. S. Army. Afterwards, in like manner, he was duly promoted and commissioned a first lieutenant in said regiment on the 25th day of September, 1876, which position he has since held and now holds; that he duly accepted all and singular the positions to which he has been promoted as herein set forth, and has always faithfully discharged the duties they imposed upon him, and that he has remained continually in the military service of the United States since he entered the United States Army as a cadet, June 15, 1865.

5. Your petitioner further says that section 7, act of June 18, 1878,

entitled "An act making appropriations for the support of the
3 Army for the fiscal year ending June 30, 1879, and for other purposes," provides "that on and after the passage of this act all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or enlisted men in the armies of the United States, regular or volunteer, shall be and are hereby credited with the full time they may have served as such officers or such enlisted men in computing their services for longevity pay and retirement;" that section 1 of an act approved February 24th, 1881, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30th, 1882, and for other purposes," provides: "The actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay;" and that the same provision is made in section 1 of an act approved June 30th, 1882, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30th, 1883, and for other purposes." Petitioner says that under the several provisions of law herein cited he has been paid service pay for all his time of service as an enlisted man in the volunteer service of the United States and as an officer in the regular Army, as hereinbefore set forth; but that in the computation of his service pay the pay department U. S. A. and the accounting officers of the Treasury have persistently refused, and still refuse, to allow him credit for "his actual time of service in the Army" as a cadet in the military service of the United States from June 15th, 1865, to June 15th, 1869, whereby petitioner has sustained and suffered loss, as specifically set forth in account hereunto annexed, amounting in the aggregate to the sum of one hundred and seventy-four dollars and 48 cents, for which sum your petitioner prays judgment, and for all proper relief.

CHARLES MORTON,
By MOBERLY & STRYKER,
Solicitors.

4 *The United States, for salary from Februvry 24, 1881, to April 1, 1883, in account with First Lieutenant Charles Morton, 3d Regiment U. S. Cavalry.*

To salary from February 24, 1881, to April 30, 1882, inclusive, for over fifteen years' service (increase under Tyler decision), being 1 year 2 months and 7 days, at $177.47 per month	$2,525 98	By salary received from February 24, 1881, to April 30, 1881, inclusive, for over ten years' service (increase under Tyler decision), being 2 months and 7 days, at $161.34 per month	$360 32
Salary from May 1, 1882, to April 1, 1883, for over twenty years' service, being 11 months at, $186.67 per month	2,053 37	Salary received fro a May 1, 1881, to June 30, 1882, inclusive, for over fifteen years' service (increase under Tyler decision), being 1 year and 2 months, at $177.47 per month	2,484 58
		Salary received from July 1, 1882, to April 1, 1883, for over fifteen years' service, being 9 months, at $173.33 per month	1,559 97
		Remaining due to Lieut. Morton, April 1, 1883	174 48
Total	$4,579 35	Total	$4,579 35

Charles Morton served as an enlisted man from July 29, 1861, to September 14, 1864, a period of 3 years 1 month and 15 days. He served as cadet at the U. S. Military Academy from June 15, 1865, to June 15,

1869, when he was graduated and appointed 2d lieutenant, 3d Cavalry, and promoted 1st lieutenant September 25, 1876; he had consequently completed 15 years of service May 1, 1877, and twenty years on the 1st May, 1882.

5 W. J. Moberley, being duly sworn, says he prepared the foregoing petition at the instance and request of petitioner, Charles Morton, first lieutenant, 3d U. S. Cavalry, and that he believes the allegations therein contained to be true. He says that petitioner is an officer of the Army on active duty on the extreme western frontier, and that it is a matter of great inconvenience, and he believes, indeed, an impossibility, for petitioner to verify his petition in person. He further says he believes that petitioner, if present, would make oath in due form to the averments in said petition.

W. J. MOBERLEY.

Subscribed and sworn to before me this 11th day of July, 1883.
[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

6 II.—*Traverse.*—*Filed Sept.* 21, 1883.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

7 III.—*Motion to amend petition.*—*Filed and allowed Dec.* 17, 1883.

Now comes claimant's attorneys and moves the court for leave to file the enclosed amended petition, the Assistant Attorney-General for the United States consenting.

MOBERLEY & STRYKER,
Attorneys for Plaintiff.

I consent to above motion.
Dec. 17, 1883.

THOMAS SIMONS,
Assistant Attorney-General.

8 IV. *Amended petition.*—*Filed Dec'r* 17, 1883.

To the honorable the chief justice and judges of the Court of Claims:

1. Your petitioner, Chas. Morton, first lieutenant, Third U. S. Cavalry, respectfully represents that he is a citizen of the United States and an officer of the regular Army of the United States, at present holding the rank of first lieutenant in the 3rd Regiment of Cavalry, U. S. Army;

that he has at all times borne true faith and allegiance to the Government of the United States, and that he has at no time voluntarily aided or abetted or given encouragement to rebellion against said Government.

2. That he served as an enlisted man in the volunteer military forces of the United States from the 29th day of July, 1861, to the 14th day of September 1864, and was then honorably discharged the service of the United States by reason of the expiration of his term of enlistment.

3. That subsequently he was appointed as a conditional cadet,
9 and admitted on probation as such cadet into the military service of the United States, on or about the 15th day of June, 1865; that in this capacity he was admitted to the United States Military Academy at West Point, in the State of New York, on or about June 15, 1865; and having subsequently, to wit, January, 1866, passed the examination required by law, having taken the oath of office prescribed by law for cadets in the military service of the United States, and having (with the consent of his parent) signed articles of engagement for service in the armies of the United States for the term of eight years, unless sooner discharged, and having fully complied with all the requirements of law to entitle him to the rights and privileges incident to the rank of cadet in the military service of the United States, he received his warrant as such cadet on the day of January, 1866, to rank as such from the 15th day of June, 1865.

4. Your petitioner further says that he served as a cadet in the military service of the United States at West Point, in the State of New York, from the 15th day of June, 1865, to the 15th day of June, 1869, when, having been duly graduated, he was promoted and commissioned a second lieutenant in the Third Regiment of Cavalry, U. S. Army. Afterwards, in like manner, he was duly promoted and commissioned a first lieutenant in said regiment on the 25th day of September, 1876, which position he has since held and now holds; that he duly accepted all and singular the positions to which he has been promoted as herein set forth, and has always faithfully discharged the duties they imposed upon him, and that he has remained continually in the military service of the United States since he entered the United States Army as a cadet, June 15, 1865.

5. Your petitioner further says that section 7, act of June 18, 1878, entitled "An act making appropriations for the support of the
10 Army for the fiscal year ending June 30, 1879, and for other purposes," provides: "That on and after the passage of this act all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or enlisted men in the armies of the United States, regular or volunteer, shall be and are hereby credited with the full time they may have served as such officers or such enlisted men in computing their services for longevity pay and retirement;" that section 1 of an act approved February 24th, 1881, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30th, 1882, and for other purposes," provides: "The actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay;" and that the same provision is made in section 1 of an act approved June 30th, 1882, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30th, 1883, and for other purposes." Petitioner says that under the sev-

eral provisions of law herein cited he has been paid service pay for all his time of service as an enlisted man in the volunteer service of the United States and as an officer in the regular Army, as hereinbefore set forth; but that in the computation of his service pay the Pay Department, U. S. A., and the accounting officers of the Treasury have persistently refused and still refuse to allow him credit for "his actual time of service in the Army" as a cadet in the military service of the United States from June 15th, 1865, to June 15th, 1869, whereby petitioner has sustained and suffered loss, as specifically set forth in account hereunto annexed, amounting in the aggregate to the sum of one hundred and seventy-four dollars and 48 cents, for which sum your petitioner prays judgment and for all proper relief.

CHARLES MORTON,
By MOBERLEY & STRYKER,
Solicitors.

11 *The United States, for salary from February 24, 1881, to April 1, 1883, in account with First Lieutenant Charles Morton, 3d Regiment U. S. Cavalry.*

To salary from February 24, 1881, to April 30, 1882, inclusive, for over fifteen years' service (increase under Tyler decision), being 1 year, 2 months and 7 days, at $177.47 per month	$2,525 98	By salary received from February 24, 1881, to April 30, 1881, inclusive, for over ten years' service (increase under Tyler decision), being 2 months and 7 days, at $161.34 per month	$360 32
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Charles Morton served as an enlisted man from July 29, 1861, to September 14, 1864, a period of 3 years 1 month and 15 days. He served as cadet at the U. S. Military Academy from June 15, 1865, to June 15, 1869, when he was graduated and appointed 2d lieutenant, 3d Cavalry, and promoted 1st lieutenant September 25, 1876; he had consequently completed fifteen years of service May 1, 1877, and twenty years on the 1st May, 1882.

12 W. J. Moberley, being duly sworn, says he prepared the foregoing petition at the instance and request of petitioner, Charles Morton, first lieutenant, 3d U. S. Cavalry, and that he believes the allegations therein contained to be true. He says that petitioner is an officer of the Army on active duty on the extreme Western frontier, and that it is a matter of great inconvenience, and he believes, indeed, an impossibility, for petitioner to verify his petition in person. He further says he believes that petitioner, if present, would make oath in due form to the averments in said petition.

W. J. MOBERLEY.

Subscribed and sworn to before me this 11th day of July, 1883.
[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Joseph W. Stryker, of the firm of Moberly & Stryker, attorneys for said claimant, who is absent from the city, being first duly sworn, deposes and says that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that the United States are justly indebted to claimant for the amount claimed over and above all just credits and offsets; and that he believes the facts stated in said petition are true.

JOSEPH W. STRYKER.

Subscribed & sworn to before me this 17th day of December, 1883.
[SEAL.] JOHN RANDOLPH,
Ass't Cl'k C't of Claims.

13 Claimant's post-office address: Fort Thomas, Arizona Territory.
Claimant's attorneys' post-office address: Washington, D. C.

14 V.—*Findings of fact and conclusion of law.*

FINDING OF FACTS.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant served as an enlisted man in the volunteer military forces of the United States from the 29th day of July, 1861, to the 14th day of September, 1864, and was then honorably discharged the said service of the United States by reason of the expiration of his term of enlistment.

II.

The claimant was appointed a conditional cadet in the service of the United States on March 6, 1865, and was admitted as a conditional cadet on July 1, 1865, into the United States Military Academy at West Point, and received his warrant as a cadet on the day of January, 1866, to date from July 1, 1865.

III.

On the 1st day of July, 1865, when the said claimant was so admitted as a conditional cadet he entered into an agreement, as required by law, in the words and figures following, to wit:

No. 41.

UNITED STATES MILITARY ACADEMY,
West Point, New York, July 1st, 1865.

I, Charles Morton, of the State of Missouri, aged nineteen years three months, having been selected for an appointment as cadet in the Mili-

tary Academy of the United States, do hereby engage, with consent of my father, in the event of my receiving such appointment, that I will serve in the Army of the United States for eight years, unless sooner discharged by competent authority. And I, Charles Morton, do solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto. And I do further swear that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

CHARLES MORTON.

Sworn and subscribed to, at West Point, New York, this twelfth day of March, eighteen hundred and sixty-six, before me.

(Signed) E. C. BOYNTON,
Captain and Adjutant.

(Record, pp. 2, 15.)

IV.

The said claimant remained at said Academy from the said 1st day of July, 1865, performing all the duties enjoined upon him by law or imposed by his superior officers, until the said 15th day of June, 1869, when he was duly graduated from said Academy; and therefore he was duly appointed and commissioned by the President of the United States a second lieutenant in the Third Regiment of Cavalry of the United States, which commission bears date on the 24th day of June, 1869, to date from 15th June, 1869; and on the 10th day of October, 1876, he was duly promoted and commissioned by the President of the United States a first lieutenant in the same regiment, to take effect from September 25, 1876, which position he held and performed the duties thereof up to the 31st day of March, 1883. He duly accepted the appointments and promotions herein stated, and faithfully discharged the duties they imposed upon him. Since the said 1st day of July, 1865, up to the 31st day of March, 1883, he remained continuously in the service of the United States in a military capacity, and he has discharged the various duties imposed upon him by law in the different positions which he has been engaged or enlisted in, and appointed and promoted to.

V.

Prior to and since 1858 each person appointed a cadet at the United States Military Academy received a written paper, signed by the Secretary

of War, which is as follows, the blanks being filled by the name of the person appointed and with the appropriate dates:

To whom it may concern:

Know ye that the President has been pleased to appoint ,
a cadet of the United States Military Academy, to rank as such from the day of , 18 .

Given under my hand and seal, at the War Department, this day of , in the year of our Lord 18 , and of the Independence of the United States the .

———— ————,
Secretary of War.

Claimant received a document, or warrant, written and executed in the above form, when he entered the United States Military Academy in 1865.

VI.

If the period during which the claimant was a cadet at West Point is to be regarded in the computation of his service or longevity pay, then, from February 24, 1881, to March 31, 1883, he has been short paid in the sum of $169.07, and is entitled to that amount; otherwise not.

16 *Conclusion of law.*

Upon the foregoing facts the conclusion of law is, that the claimant is entitled to judgment for $169.07, on the grounds stated in the following

VI.—*Opinion of the court.*

DRAKE, Ch. J., delivered the opinion of the court.

The claimant, a first lieutenant of cavalry, sues for longevity pay to which he considers himself lawfully entitled, but which has been withheld from him. He was for four years a cadet at the Military Academy at West Point, where he graduated. If those four years are to be counted as a part of his service in the Army, he is entitled to the longevity pay; otherwise not.

The general provision of law upon which the right of officers to that description of pay primarily rests, is section 1262 of the Revised Statutes, in these words: "There shall be allowed and paid to each commissioned officer below the rank of brigadier-general * * * ten per centum of their current yearly pay for each term of five years of service."

This claim, however, does not rest on this provision alone, but upon it in connection with a clause, found in the Army appropriation act for the fiscal year ending June 30, 1882 (21 Stat. L., 346, ch. 79), and also in the like act for the fiscal year ending June 30, 1883 (22 Stat. L., 117, ch. 254), in these words: "additional pay to officers for length of service, to be paid with their current pay, and the actual time of service in the Army * * * shall be allowed all officers in computing their pay."

The point of contention is in connection with the words "actual time of service in the Army."

As the claimant's commission as a second lieutenant of cavalry was to date from June 15, 1869, he cannot recover if his time of service began only on that day. To entitle him to recover the demand sued on, he must be allowed—1. His period of service since he was commissioned; 2. The time he was a cadet at the Military Academy; and 3. The time of a previous service in the volunteer military forces of the United States in 1861–1864. As to the first and third there is no controversy; the contest is over the second; and it presents a question not hitherto judicially passed on.

That the claimant, while at the Academy, was in some kind of a service, that is, duty performed under orders of superiors, will not be questioned by any one who knows anything about the work, physical and mental, that a cadet there has to do, and the character of military authority and discipline to which he is subject. His "actual time of service" is every day that he is there, except when he is on the sick list. No private soldier in the Army is more in service than a cadet at West Point; though, of course, the characters of the two services are quite different.

But the point is, whether that was "service in the Army." The defendants, resting upon an opinion given by Attorney-General MacVeagh, contend that it was not; the claimant insists that it was. We concur with the claimant, upon grounds which we will very briefly state.

In section 1094 of the Revised Statutes, declaring what "the Army of the United States shall consist of," we find "the corps of cadets of
17 the United States Military Academy" named as a part of the Army; and section 1323 provides that "Cadets shall be subject at all times to do duty in such places and on such service as the President may direct."

Section 1321 says, too, that a cadet who refuses to take a prescribed oath of allegiance "shall be dismissed from the service."

Furthermore the Regulations for the Military Academy, adopted by the President, declare, in fifteen different instances, offenses for which a cadet may be dismissed, not from the Academy, but "from the service."

In view of these plain and express provisions of law and regulations, we are at a loss to understand why a cadet at a Military Academy is not in "service in the Army." That he is pursuing there the studies and passing through the discipline which are to fit him for higher duty and perhaps great achievements in military life, does not, in our opinion, at all affect or even touch the status given him, in unmistakable words, by the laws under which both the Academy and the Army exist.

The judgment of the court is, that the claimant recover the amount demanded in his petition, $169.07.

VII.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 18th day of February, A. D. 1884, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the said Charles Morton do have and recover of and from the United States the sum of one hundred and sixty-nine $\frac{07}{100}$ dollars ($169\frac{07}{100}$).

19 VIII.—*Application for and allowance of appeal.—Filed March 31, 1884.*

From the judgment rendered in the above-entitled cause on the 18th of Febr'y, 1884, in favor of claimant, the defendants, by their attorney-general, on the 31st day of March, 1884, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

And now, to wit, this 31st day of March, A. D. 1884, it is ordered that the appeal be allowed as prayed for.

20 In the Court of Claims.

IX.

CHARLES MORTON
vs.
THE UNITED STATES. } No. 13963.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the defendants for the allowance of appeal to the Supreme Court of the United States, and the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 24th day of April, A. D. 1884.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 841. The United States, appellant vs. Charles Morton. Court of Claims. Filed 24th April, 1884.

112-1

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE UNITED STATES
v.
MORTON. } No. 841.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE UNITED STATES
v.
MORTON. } No. 841.

BRIEF FOR THE UNITED STATES.

This case is submitted to the court upon the face of the statutes which concern it, given below.

It involves the question whether the status of a cadet at West Point is one of "*service*" in the Army, within the statutes which use that expression in fixing longevity pay.

An opinion upon this question by Attorney-General MacVeagh is appended; and this appeal is somewhat based upon the respect due to that opinion, and to views concurring therein, held by high officers in the Treasury Department whose duty it is to consider and pass upon it.

Inasmuch as the term of *service* for which cadets so expressly and formally engage, under section 1321, has ever since the year 1812 been uniformly held by the Government, as I am told at the War Department, to begin *at their entry* into the Academy; and the more as

with that construction before it Congress in 1838 significantly enlarged that term from *five* years to *eight*, I am embarrassed to deny absolutely that cadetship may carry with it the same meaning as regards *longevity*.

And besides, inasmuch as the appropriation acts of 1881 and 1882, under which this claim was brought, no longer require the term of service by an officer to be service *as an officer*, nor even require such service together with *service as an enlisted man*, but allow to officers in the Army the benefit also of previous service *in the Navy*, and *vice versa*, it has seemed to me that no inquiry as to either the method by which a cadet enters the Army, or the character of the service which he afterwards performs therein, is in this connection useful.

The question is therefore submitted to the judgment of the court.

S. F. PHILLIPS,
Solicitor-General.

APPENDIX.

DEPARTMENT OF JUSTICE,
Washington, May 14, 1881.

Hon. ROBERT T. LINCOLN,
Secretary of War:

SIR: Your two letters of the 6th instant direct my attention to a clause in the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1882, and for other purposes," approved February 24, 1881, which reads as follows:

> "Additional pay to officers for length of service, to be paid with their current monthly pay, and the *actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay.*"

And also submit for my consideration whether, in certain cases hereinafter stated, officers of the Army are entitled to the benefit of that part of the above provision which declares that, in computing their length of service or longevity pay, "the actual time of service in the Army or Navy, or both, shall be allowed."

The cases referred to, and the particular inquiries arising thereon, are these:

1. Where the officer was appointed a cadet at the Military Academy, and served as such, whether the actual time of his service as cadet should be allowed in computing his longevity pay.

2. Where the officer was appointed an officer in the Medical Corps of the Navy, and served as such, whether the actual time of his service as an officer in that corps should be allowed in computing his longevity pay.

3. Where the officer served as a captain's clerk in the Navy, whether the actual time of his service as such clerk should be allowed in computing his longevity pay.

4. When the officer served as an assistant civil engineer in the employ of the War Department on the Florida coast survey and elsewhere, whether the actual time of his service in that capacity should be allowed in computing his longevity pay.

Previous to the passage of the act of July 15, 1870, chapter 294, all commissioned officers of the Army were allowed an additional ration, called "longevity ration," for every five years of service. This allowance was authorized by the fifteenth section of the act of July 5, 1838, chapter 162, amended by section 9 of the act of March 2, 1867, chapter 145, and (the ration being commuted in money) it was virtually a periodical increase of the officer's compensation. The act of 1838, as amended, provided that every commissioned officer of the line or staff "shall be entitled to receive an additional ration per diem for every five years he may have served or shall serve in the Army of the United States." According to the construction which was given to this provision, only service rendered as a commissioned officer in the Regular Army could be computed in determining the right of an officer to the benefit thereof.

The act of 1870 did away with the longevity ration, but provided (section 24) that there should be "allowed and paid to each and every commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, 10 per centum of their current yearly pay for each and every term of five years of service: *Provided*, That the total amount of such increase for length of service shall in no case exceed 40 per centum on the yearly pay of his grade as established by this act."

This provision is embodied in sections 1262 and 1263 Revised Statutes, and the construction which it received in practice corresponded to that placed upon the former

provision giving the longevity ration—that is to say, in allowing the 10 per cent. increase of pay *length of service as a commissioned officer in the regular army only* was taken into account.

Further provision on the subject was made by the 7th section of the act of June 18, 1878, chapter 263, which declared that thereafter "all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States, regular volunteers, shall be, and are hereby credited with the full time they may have served as such officers and as such enlisted men in computing their service for longevity pay," &c. By this section, service as a *commissioned officer* in the volunteer army *during the war of the rebellion*, and also services as an *enlisted man* in either the volunteer or regular army *at any period*, were brought into the account and required to be credited equally with service as a commissioned officer in the Regular Army in computing an officer's longevity service; but service as a cadet at the Miltary Academy does not come within the section. (16 Opin., 611.)

The act of February 24, 1881, provides that in computing the pay of officers, for length of service "the actual time of service in the Army or Navy, or both, shall be allowed."

The question submitted by you is whether the period passed by a cadet at West Point receiving his military and other instruction at that Acadamy is to be computed as "actual time of service in the Army;" and I have no difficulty whatever in answering this question in the negative.

Attorney-General Cushing (7 Op., 333), said:

> "We see by the statute that the internal military organization of the Academy is for the purpose of military instruction. *It is not actual service in the Army.*"

If it had been the intention of Congress to enact that the period passed by the cadets at West Point should be placed upon the footing of *actual service in the Army*, it would have been perfectly easy to have said so by language incapable of being misunderstood; and it seems to me that it is extremely undesirable to torture the language of Congress in order to find in it, by relation to some other statute, a technical effect, when the apt words to express such an intention readily occur to every unbiased mind. It is very true that the corps of cadets at West Point constitute part of the Army, but it does not follow that a cadet pursuing his studies at West Point is in *actual service in the Army*, within the meaning of the clause in the army appropriation bill; and, if Congress at any time desires to add this advantage to those already possessed by the young men who are educated at the public expense at the Military Academy, it will be very easy for it to do so by declaring that the time passed by cadets at the Military or Naval Academy shall be computed as "actual time of service in the Army or Navy;" but, until language clearly indicative of this meaning is used it would be, in my judgment, very unwise to endeavor to extract it from a clause in the army appropriation bill treating only of the Army as in actual service in the ordinary meaning of the phrase.

With respect to naval service, this was not within the legislation referred to which was enacted previously to the act of 1881, but is first introduced and required to be taken into account by that act. The terms "service in the Navy" are not less general or comprehensive than "service in the Army." They include service in the naval forces, whether regular or volunteer, and whether a commissioned officer of the line or staff, or as warrant or other officer, or as an enlisted man; and for such service the act of 1881 entitles an army officer to credit in computing his longevity pay.

I am accordingly of opinion that under the act of Feb-

ruary 24, 1881, in each of the *second* and *third* cases above enumerated, the officer should be allowed, in computing his longevity pay, the actual time of his service in such case described, but that in the remaining case, *the fourth*, the officer should not be allowed the actual time of his service therein described in computing his longevity pay. The negative answer in the latter case rests on the ground that his service as an assistant civil engineer in the employ of the War Department in the Survey mentioned was not actual service in the Army.

The papers which accompanied your letters are herewith returned.

I am, sir, very respectfully,

WAYNE MACVEAGH,
Attorney-General.

SEC. 1094. The Army of the United States shall consist of * * * and the professors and corps of cadets of the United States Military Academy.

SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, 10 per centum of their current yearly pay for each term of five years service.

SEC. 1263. The total amount for such increase for length of service shall in no case exceed 40 per centum on the yearly pay of the grade as provided by law.

SEC. 1320. Each cadet shall, previous to his admission to the Academy, take and subscribe an oath or affirmation in the following form:

> "I, A. B., do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovreignty of the United States, paramount to any and all allegiance, sovreignty, or fealty I may owe to any State, county, or

country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the rules and articles governing the armies of the United States."

And any cadet or candidate for admission who shall refuse to take this oath shall be dismissed from the service.

SEC. 1321. Each cadet shall sign articles, with the consent of his parents or guardian, if he be a minor, and if any he have, by which he shall engage to serve eight years unless sooner discharged.

SEC. 1322. The corps of cadets shall be arranged into companies, according to the directions of the superintendent, each of which shall be commanded by an officer of the Army, for the purpose of military instruction. To each company shall be added four musicians. The corps shall be taught and trained in all the duties of a private soldier, non-commissioned officer, and officer, shall be encamped at least three months in each year, and shall be taught and trained in all the duties incident to a regular camp.

SEC. 1323. Cadets shall be subject at all times to do duty in such places and on such service as the President may direct.

(Act of 1881, ch. 79, sec. 1, 21 Stat., 346.)

FOR PAY OF THE ARMY.

* * * * * * *

Additional pay to officers for length of service, to be paid with their current monthly pay; and the actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay; &c., &c.

The provision in the act of 1882, ch. 254. sec. 1, (22 Stat., 117), is a copy of the above.

In the like provisions by the acts of 1883, Ch. 93 (22 Stat., 456), and 1884; Ch. 216 (Pamph., 106), the words after the first semicolon are omitted.

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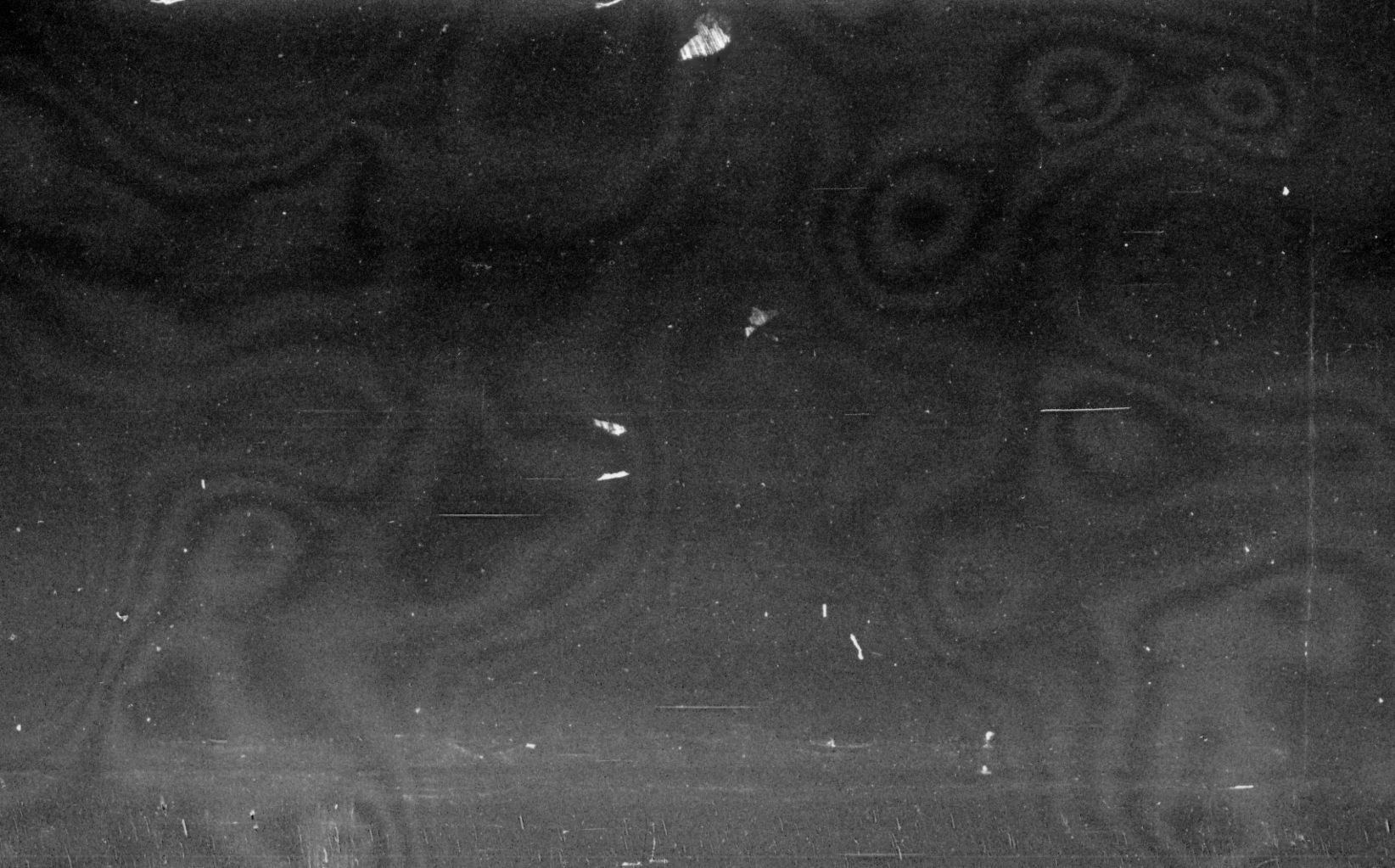

IN THE

Supreme Court OF THE United States.

OCTOBER TERM, 1884.

No. 841.

THE UNITED STATES,
Appellant,

vs.

CHARLES MORTON.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF S. S. HENKLE, COUNSEL FOR APPELLEE.

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Statement of the Case.

The appellee was a first lieutenant and is now a captain in the cavalry service of the United States. He served through the war of the rebellion as an enlisted man. After the war he was appointed a cadet about June 15, 1865, and after examination, taking the oath required by law and subscribing the articles to serve eight years, he was admitted to the Military Academy, from which he graduated abont the 15th. of June, 1869, when he was promoted and commisioned second lieu-

tenant in the 3rd Regiment of Cavalry. He has been continuously in the service ever since. In estimating his his longevity pay, he has been allowed and paid for his period of service as an enlisted man and also for his time of service as a commissioned officer; but he claims also to be entitled to have the time of his service as a cadet at the military academy estimated in reckoning his longevity pay; the proper accounting officers having refused this demand he brought this suit in the Court of Claims for the purpose of obtaining a judicial construction of his rights under the several acts of congress in force relating to the subject.

The Court of Claims found all the facts as he claims them and further, that "if it should be determined that the claimant was entitled to have his cadet time computed in estimating his longevity pay, then from Feb'y 24, 1881, to March 31, 1883, he has been short paid in the sum of $169.07 and is entitled to that amount. Sec. (Finding 6 p. 8 Rec.) The Court of Claims adjudged the appellee entitled to compute his cadet service, and entered judgment for him accordingly.

ARGUMENT.

The appellee claims first, under the act of July 15, 1870 found in the Revised Statutes as Sec. 1262.

"There shall be allowed and paid to each commissioned officer below the rank of brigidier-general including captains and others having assimilated rank and pay, ten per centum of their current yearly pay for each term of five years of *service*."

He also claims under the following clause found in the Army Appropriation Act for the fiscal year ending June 30, 1882. 21 Stats. L. 346, ch. 79. viz:

"Additional pay to officers for length of *service*, to be paid with their current pay, and the *actual time of service in the army* * * * shall be allowed all officers in computing their pay". And the same clause was inserted in the like act for the fiscal year ending June 30, 1883. (22 Stats. L. 117, ch. 254.)

It is said that the accounting officers of the Government construed the "*five years of service*" in the act of July 15, 1870 to mean *service as commissioned officers.*

The language of the act admits of no such limitation the additional pay is given for length of *service* in the army, and it makes no difference whether a part of the service was rendered as a commissioned officer or a non-commissioned officer or otherwise. If Congress had intended to so limit it, it would have said " for each term of five years service as such commissioned officer."

I am aware that Attorney-General McVeagh gave to the Secretary of War the opinion that the clause in the Appropriation Act referred to for 1882 wherein an officer is allowed for "*the actual time of service in the army*" did not apply to the *cadet service*, he holding that the cadet was not in *actual service in the army.* But the admission that he makes that "*the corps of cadets at West Point constitutes a part of the army*" it seems to me is a complete refutation of his conclusion.

If the cadet is *a part* of the army, he is in the *Military service.* He is not simply at school acquiring an education, for the most casual reading of the regulations prescribed by the President of the United States for the Government of the Military Academy will show, that the *Military service* of the cadet is as onerous and exacting as that of the soldier in the camp or in the field.

The service of the cadets originally was in the camp and the field as other soldiers, and they were scattered

through every arm of the service, and the fact that the Government has collected them all into one corps and located an academy for military instruction at the post does not *retire* them from *actual service in the army*.

If the cadet is a part of the army he is in *the actual military service*. The military dicipline to which hs is subjected—the amenability to trial for offences by court-martial and the whole police of the academy and the post are essentially the same as those applicable to the other branches of the service.

It would hardly be claimed that the new recruit when being drilled in the tactics, is not for that reason in the *actual military service*. The cadet is being taught the same tactics, and is subject to the same discipline and is liable to be ordered into the field at any time by the President, as other soldiers.

I insist that the solution of the question with which we are dealing, depends solely upon whether tne cadet is a part of the military establishment of the United States or not.

If there could be any doubt about it, a few citations from the acts of Congress touching the subject, I think must conclusively settle it.

IS, THEN, A CADET AT THE MILITARY ACADAMY AT WEST POINT IN THE MILITYRY SERVICE OF THE UNITED STATES?

The cadet first appears in the legislation of Congress in "An act providing the raising and organizing a corps of artillerists and engineers," approved May 9, 1794. (1 Stats. L., 366.) This was the second Congress under the Constitution.

The first section provides for the raising of 764 non-commissioned officers, privates, and artificers to serve as

privates and musicians, to be engaged for three years by voluntary enlistments; and that the proper proportion of commissioned officers shall be appointed to command the same.

Sec. 2 provides that this body of commissioned and non-commissioned officers, privates, artificers and musicians "shall be incorporated with the corps of artillery now in the service of the United States, and denominated the corps of artillerists and engineers."

Sec. 3 provides that the organization of the corps be one lieutenant-colonel commandant, one adjutant, one surgeon; four battalions, each to consist of one major, one adjutant and paymaster, and one surgeon's mate; and four companies, each to consist of one captain, two lieutenants, two CADETS *with the pay, clothing and rations of a sergeant*, four sergeants, four corporals, forty-two privates, sappers and miners, and artificers to serve as privates and two musicians.

Sec. 4 provides that the additional commissioned officers, non-commissioned officers, privates, artificers and musicians, by this act directed to be raised, shall receive the same pay and allowances in all respects as the troops already in the service of the United States; and they shall also be governed by the same rules and articles of war which have been or may be by law established.

By this act the *cadet* was to have the pay, clothing and rations of a sergeant, and he was just as distinctly a part of the corps of artillerists and engineers as the sergeant.

By the 6th section of the act of July 16, 1798, being An Act to augment the Army of the United States,

and for other purposes," 1 Stats. at L., p. 605, it is provided that the monthly pay of non-commissioned officers, musicians and privates shall be as follows: * * * * * * *"*cadets ten dollars, and two rations per day.*"

MILITARY ACADEMY ESTABLISHED.

March 16, 1802, Congress passed "an act fixing the military peace establishment of the United States," (2 Stats. L., p. 132.)

The 2nd section provides that each company to consist of one captain, one first lieutenant, one second lieutenant, *two cadets*," etc.

The 4th and 5th sections provide for the monthly pay of the officers, *cadets*, etc.

Sec. 26, (p. 137,) authorized the President to organize a corps of engineers to consist of one engineer with the pay, rank and emoluments of a major, two assistant engineers with pay, rank and emoluments of captains, two other assistant engineers with pay, rank and emoluments of first lieutenant; two other assistant engineers with pay, rank and emoluments of second lieutenant, and ten *cadets* with the pay of sixteen dollars per month and two rations per day, and the President is likewise empowered to make promotion with a view to particular merit and without regard to rank, so as not to exceed one colonel, one lieutenant, two majors, four captains, four first lieutenants, four second lieutenants, and so as that the number of the whole corps shall at no time exceed twenty officer and cadets

Sec. 27 provides that the corps when so organized shall be stationed at West Point and shall constitute a military academy, "and the engineers, assistant engi-

neers, and *cadets of said the corps shall be subject at all times to do duty in such places and in such service as the President of the United States shall direct.*"

Sec. 28 provides that the principal engineer, and, in his absence, the next in rank, shall have the superintendence of the said military academy, under the direction of the President of the United States; and the Secretary of War is authorized to procure at public expense the necessary books, implements and apparatus for the use and benefit of the institution.

By the 2d section of the act of February 28, 1803, (2 Stats., L. 206,) entitled "An act in addition to an act entitled 'An act fixing the military peace establishment ofthe United States,'" the President is authorized to appoint a teacher of French and a teacher of drawing, to be attached to engineer corps with the pay of captain in the line.

By the 3d section the commanding officer of the corps of engineers is authorized to enlist for a term of not less than three years an artificer and 18 men, to aid in making practical experiments and for other purposes, to receive the same pay, rations and clothing as artificers and privates in the army of the United States.

On the 12th of April, 1808, Congress passed "An act to raise for a limited time an additional military force." 2 Stats. L., 481.

Sec. 1 provides for raising five regime ts of infantry, one regiment of riflemen, one regiment of light artillery, one regiment of light dragoons, to be enlisted for five years unless sooner discharged.

Sec. 2 provides how the regiments and companies shall be organized and officered, and among other provisions is the following: "Each company of infantry and riflemen to consist of one captain, one first and one second lieutenant, one ensign, *two cadets*, four sergeants, four corporals, two musicians and sixty-eight privates, * * * * and each troop of light dragoons of one captain, one first and one second-lieutenant, one cornet, *two cadets*, four sergeants, four corporals, two musicians, one saddler, one farrier and sixty-four privates.

Sec. 4 provides, that the compensation of officers, *cadets*, non-commissioned officers, musicians, artificers and privates, authorized by this act shall be viz: After designating the pay and allowances of each grade of commissioned officers it proceeds, "and all other officers, *cadets*, non-commissioned officers, musicians, artificers and privates authorized by this act, shall receive the like pay, clothing, rations, forage and other emoluments as the officers, *cadets*, non-commissioned officers, musicians, artificers and privates of the present military establishment."

Sec. 5 provides, that in case of disability by wounds, or otherwise, contracted in the service, the officers, *cadets*, &c., shall be entitled to like compensation with the officers, *cadets*, etc., in the present military establishment, and with them, shall be subject to the rules and articles of war.

The act of April 29, 1812, entitled "An act making further provision for the corps of engineers," 2 Stats., L. 721, organized the military academy substantially upon the basis that has continued until the present day.

The 2d section of this act designates the professors, and fixes their pay and defines the branches to be taught.

The 3d section enacts that the cadets heretofore appointed in the service of the United States, whether of artillery, cavalry, riflemen or infantry, or that in future be appointed as hereinafter provided, shall at no time exceed two hundred and fifty; that they may be attached at the discretion of the President of the United States as students to the military academy, and be subject to the established regulations thereof; that they shall be arranged into companies of non-commissioned officers and privates, according to the direction of the commandant of engineers, and be officered from the said corps for the purposes of military instruction; "that each cadet, previously to his appointment by the President of the United States, shall be well versed in reading, writing and arithmatic, and that he shall sign articles, with the consent of his parent or guardian, by which he shall engage to serve five years, unless sooner discharged; and all such cadets shall be entitled to and receive the pay and emoluments now allowed by law to cadets in the corps of engineers."

The 4th section provides that "upon graduation the cadet shall be considered a candidate for a commission in any corps, according to the duties he may be judged competent to perform; and in case there shall not at the time be a vacancy in such corps he may be attached to it at the discretion of the President of the United States by brevet of the lowest grade as a supernumerary officer, with the pay and usual emoluments of such grade until a vacancy shall happen."

The act of March 3, 1815, 3 Stats. at L., 224, entitled "An act fixing the military peace establishment of the United States," defines how the regiments in the different arms of the service shall be organized and of what officers and men they shall be composed, but does not mention cadets until the 4th section, which provides

that the "compensation, subsistence and clothing of the officers, *cadets*, non-commissioned officers, musicians, artificers and privates comprising the military peace establishment, shall be the same as are prescribed by the act entitled "An act fixing the military peace establishment of the United States," passed 16 March, 1802, and an act entitled "An act to raise for a limited time an additional military force," passed April 12, 1808," etc.

By the 28th section of the act of Congress of July 5, 1838, entitled "An act to increase the present military establishment of the United States, and for other purposes," 5 Stats. at L., p. 260, it is enacted "That the term for which cadets hereafter admitted into the military academy at West Point *shall engage to serve*, be, and the same is hereby, increased to eight years, unless sooner discharged."

The Rev. Stats. from Sec. 1309 to 1341 contain a compilation of the laws now in force relating to the military academy and to *cadets*.

It will be found that many of the provisions already cited are contained in the present law, and that the only substantial difference in the relation of the cadet to the military service is, that originally and for many years the cadets were part of the army in the field and camp, and were distributed among each branch of the service, and since about the year 1812, they have been collected into one corps, and permanently stationed at West Point, for the purpose of more efficient instructions in the military science.

That Congress still treats them as ameanable to service in the field is shown by Sec. 1323, Rev. Stats: "Cadets shall be subject at all times to do duty in such places and in such service as the President may direct."

As we have seen, the *cadet* was by express provisions of many statutes made *a part of the army before the*

military academy was founded, and all the legislation of Congress since touching the subject treats him still as a part of the army.

Save in exceptional cases cadets are appointed one year in advance of their admission to the academy, but without pay until such admission. See Sec. 1317, Rev. Stat.

Prior to his admission to the academy, he is required to take and subscribe the following oath:

"I, A. B. I do solemnly swear that I will support the constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States paramount to any and all allegiance, sovereignty or fealty, I may owe to any state, county or country whatsoever; and that I will at all times obey the legal orders of any superior officers, and the rules and articles governing the armies of the United States."

And any cadet or candidate for admission who shall refuse to take this oath shall *be dismissed from the service*." See Sec. 1320 Rev. Stats.

Cadets are tried by courts-martial "subject to the same limitations and conditions now existing as to other general courts-martial." Rev. Stats. Sec. 1326.

"The superintendent and commandant of cadets while serving as such, shall have respectively the local rank of colonel and lieutenant-colonel of engineers." Rev. Stats. Sec. 1310.

"The superintendant, and in his absence the next in rank shall have the immediate government and military command of the academy, and shall be commandant of the military post of West Point." Ibid. Sec. 1311.

"The superintendant, the commandant of cadets and the professors shall be appointed by the President. The assistant professors, acting assistant professors, and the adjutant shall be officers of the army detailed and as-

signed to such duties by the Secretary of War, or cadets assigned by the superintendent under the direction of the Secretary or War." Ibid. Sec. 1313.

"The superintendent and commandant of cadets may be selected, and all the officers on duty in the academy may be detailed from any arm of the service, but the academies' staff as such shall not be entitled to any command in the army separate from the academy." Ibid. Sec. 1314.

"Cadets of the military academy shall receive five hundred dollars a year and one ration a day." Ibid. Sec. 1329.

These provisions as well as all other contained in the Revised Statutes relating to the military academy show clearly that it is simply a school for training officers for command in the field, and that in every feature of it, it is a component part of the army of the United States.

Revised Statutes Title "The Army," Sec. 1094, defines of what the army shall consist:

"The army of the United States shall consist of one general." * * * * * * *
"and the professors and corps of cadets of the United States military academy."

Here is the express enactment of Congress that the cadet is a constituent part of the army of the United States.

I now call the attention of the Court to "THE GENERAL REGULATIONS FOR THE UNITED STATES MILITARY ACADEMY, BY THE PRESIDENT OF THE UNITED STATES."

ORGANIZATION.

"1. The general commanding the Army, under the War Department, shall have supervision and change of the United States Military Academy."

"He will watch over its administration and dicipline and the instruction of the corps of cadets, and will make reports thereof to the Secretary of War." (p.9.)

3. "The professors of the academy, being staff officers of the army, are assimilated in rank to the grades of which they are entitled by law to pay and allowances." Ibid. p. 9.

DISCIPLINE.

Sec. 105. "The professors, instructors, and cadets of the military academy are by law, subject to the rules and artlcles of war." (p.) 44.

Sec. 108. "The punishments of the first class men-by tioned in the preceeding paragraph may be inflicted by the superintendent; those of the second class only by the sentence of a general court-martial, except in cases of mutinous conduct, or breach of arrest; and those of the third class only by the Secretary of War."

Sections 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 123, 125, 126, 127. Each of these sections provides as a punishment for the offences nominiated in them respectively; that the offender shall be *"dismissed the service."* (By the Secretary of War, see section 108.)

The "*service*" can only be in the *military service* of the United States.

These regulations promulgated by the President of the United States, in every article and section, are designed to enforce military discipline and government in this institution.

Mr. Justice Davis, in the Babbitt case, 16 C. C. 202, in his able and exhaustive opinion, after reviewing the history of the legislation of Congress relating to the cadet service and of the military service from the first act down to the Revised Statutes, says on p. 219:

"Under the act of April 29, 1812, (2 Stats. L. 720,) from which the real existence of the academy in its present form dates and which contains the most important provisions codified in the Revised Statutes, the various branches of cadets were gathered into one body of students at West Point. The cadet disappeared as a feature in company organization in the army, and was soon legislatured out of that organization, (3 Stats. L. 615,) but his status toward the government and his rank in the service remained unchanged."

In the Babbitt case the claimant was an army officer, who had graduated at West Point before the war and had served through the war as an officer. He claimed to be entitled to count his service of four years in the military academy in estimating his longevity pay. He based his claim, however, upon the 7th section of the Act of June 18, 1878.

"Sec. 7. That on and after the passage of this act, all officers of the army of the United States, who had served as officers in the volunteer forces during the war of the rebellion, or *as enlisted men* in the armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as such officers and as such enlisted men in computing their service for longevity pay and retirement." (20 Stats. L. 150.)

This law provides that the regular army officers shall be entitled to count the time spent in two classes of service; 1st, as an officer of volunteers during the war of the rebellion, 2nd, as enlisted men in the armies of the United States.

The claimant, Major Babbitt, had no service as an officer in the volunteer forces during the war of the rebellion, but he claimed to be credited with his cadet service as the service of an "enlisted man" in the army.

Mr. Justice Davis in an able and elaborated opinion holds that *cadets* are not *enlisted men* in the army, but

he concedes and I think demonstrates that they are inferior officers in the army.

On p. 216, the court say: "Congress has exercised the power in this respect in the very language of the constitution." It has enacted that the corps of cadets "shall be appointed by the President" (Rev. Stats. 1315.) In our opinion this as clearly makes each member of that corps an inferior officer as though the Statute proceeded to declare him so."

If the counsel for the claimant had based his claim upon the act of July 15, 1870, carried into the Revised Statutes as Sec. 1262, the court, upon its reasoning, must have sustained his demand.

Babbitt lost his case not because he was not entitled to what he claimed, but because he brought his suit under the wrong Statute.

In conclusion I submit that the able opinion of Chief Justice Drake found in the record, demonstrates that the appellee is entitled to be credited with his cadet service, and that the judgment of the Court of Claims should be affirmed.

S. S. HENKLE,
Counsel for Appellee.